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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BELOIT & ASSOCIATES,
INC.,

Plaintiff and Appellant,

v.

GEORGE MICHAEL et al.,

Defendants and
Respondents.

B286460

(Los Angeles County
Super. Ct. No. BC596303)

APPEAL from an order of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

The Casas Law Firm, Joseph N. Casas, for Plaintiff and Appellant.

Campbell & Farahani, Frances M. Campbell, Nima Farahani, for Defendants and Respondents.

Plaintiff and appellant Beloit & Associates, Inc., appeals from a judgment awarding attorney fees in favor of defendants and respondents George Michael and Brigitte Kamel in this action arising out of a residential lease agreement. On appeal, Beloit contends: (1) the parties' settlement agreement included a waiver of costs, and (2) because the action was voluntarily dismissed, there was no prevailing party under Civil Code section 1717 for purposes of an award of attorney fees. We conclude the plain language of the settlement agreement did not include a waiver of costs. The record on appeal is inadequate to permit review of the trial court's findings, but even were we to find the record adequate, substantial evidence supports the trial court's finding that Michael and Kamel were the prevailing parties for purposes of Civil Code section 1717 because a judgment was entered in their favor on the complaint and the cross-complaint. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In June 2012, tenant Michael, also known as George Asaad, entered into a residential lease agreement with landlord Beloit. The lease provided for attorney fees as follows: "In the event action is brought by any party to

enforce any Term of Lease, or to recover possession of Premises, the prevailing party shall recover from the other party reasonable attorney fees, not to exceed five hundred dollars (\$500). Refer to Addendums.”

“Addendum M” to the lease provided for additional attorney fees as follows: “Lessee shall communicate and attempt to resolve any issue with Lessor in good faith and in person. If Lessee fails to resolve any such matter directly with Lessor, any cost which Lessor feels would have been resolved without involvement of an attorney may be charged back to Lessee. If Lessor, in order to enforce any provisions of Lease, or in a defense of any claim regarding Lease asserted by Lessor on Lessee, incurs attorney fees and/or other costs or expenses, Lessee agrees to pay all such fees, costs, and expenses upon demand whether or not suit is filed against Lessee. Both Parties acknowledge that jury trials require a longer time to adjudicate the controversy and increase cost of litigation between the Parties, on this basis, all Parties mutually waive any right to a jury trial in any action, proceeding or hearing whatsoever on any matter arising out of, or in any way related to this Lease, the relationship of Lessor or Lessee created hereby, Lessee’s use and occupancy of Premises, any claim of injury or damage, or the enforcement of any law, statute, regulation or ordinance, now or hereafter in effect. In any action for unlawful detainer, Lessee shall deposit unpaid Rent with Court by cashier’s check or money order, as required and permitted by law. Lessee agrees that with Lessor’s demand, all disputes,

except for Rent due, possession and unlawful detainer, be submitted to binding arbitration before the County of venue. Lessee shall be responsible for any and all charges, costs and attorney fees by reason of Lessee's default of. [sic] The venue for court actions shall be Santa Monica, Los Angeles, or San Diego Court, location decided by Lessor or Lessor's attorney at his/her absolute and sole discretion, on a case by case basis, and the decision is then final and endorsed by Lessee. Lessee shall be liable for any witness fee as presented to court by Lessor. Refer to Lease for limitations." Kamel executed a document as a cosigner agreeing to the lease and all addendums.

The case summary reflects that Beloit filed a complaint against Michael and Kamal on September 29, 2015. A third amended complaint filed on October 5, 2016, is the operative complaint. Michael and Kamel filed a cross-complaint on November 22, 2016. The record on appeal does not include copies of the complaints or the cross-complaint.

On April 13, 2017, Beloit's attorney spoke with Michael and Kamel's attorney (opposing counsel). In a declaration filed in the case, Beloit's attorney stated that he conveyed Beloit's offer to return the tenants' \$500 security deposit and dismiss the matter with prejudice in exchange for a waiver of costs. Beloit's attorney sent an e-mail to opposing counsel that same day confirming Beloit's offer to resolve the case through a dismissal with prejudice in exchange for a waiver of costs. The e-mail did not mention any payment to Michael and Kamel.

On April 14, 2017, opposing counsel replied and attached an offer to compromise under Code of Civil Procedure section 998. Counsel stated that Michael and Kamel denied causing any damage to the property and insisted upon the return of the \$500 security deposit. Michael and Kamel's offer to compromise provided for Beloit to receive nothing on its complaint and for Michael and Kamel to receive \$500 from Beloit on their cross-complaint. The offer did not address costs. Beloit accepted the offer that same day.

Michael and Kamel filed the executed offer to compromise with the trial court on April 17, 2017. A minute order dated April 21, 2017, reflects that the trial court received the offer to compromise and Beloit's acceptance of the offer. The court reviewed and approved the offer of compromise, and ordered judgment be entered pursuant to the offer of compromise.

Beloit filed a notice of settlement on April 24, 2017, stating that Beloit would file a request for dismissal within 45 days. Michael and Kamel lodged a proposed judgment with the court, which the court received on April 26, 2017, and entered on May 16, 2017, in favor of Michael and Kamal on the complaint and against Beloit in the amount of \$500 on the cross-complaint. Space was provided for an award of costs and attorney fees. Beloit did not file any objections to the proposed judgment.

On July 14, 2017, Michael and Kamal filed a motion for attorney fees under Civil Code section 1717 seeking an

award of \$31,797.50. Beloit opposed the motion on the grounds that the parties' compromise agreement included a waiver of costs, contractual attorney fees may not be awarded pursuant to a voluntary dismissal of a case because there is no prevailing party under Civil Code section 1717, the provision capping attorney fees at \$500 was enforceable despite Addendum M, and Addendum M to the lease was void. In a declaration filed in support of the opposition, Beloit's attorney described his telephone conversation with opposing counsel on April 13, 2017, and attached the subsequent e-mail correspondence between the attorneys. After receiving the offer to compromise under section 998, he had informed his client Beloit that in exchange for payment of the \$500 deposit and dismissal of the action with prejudice, Michael and Kamel would waive attorney fees and costs. Based on these terms, Beloit instructed him to accept the offer. On September 8, 2017, Beloit filed a request for dismissal of the action against Michael and Kamel.

Michael and Kamel filed a reply to the motion for attorney fees. They stated that although Beloit offered to settle in exchange for a waiver of costs, Michael and Kamel had not accepted Beloit's offer. Their counter-offer in reply extinguished the original offer. They further argued that the attorney fees provision in Addendum M modified the \$500 cap on fees in the lease, and Civil Code section 1717 made the unilateral provision in Addendum M reciprocal between the parties.

A hearing was held on October 5, 2017. No reporter's transcript or agreed statement has been made part of the record on appeal. An order dated October 12, 2017, reflects that the trial court found Beloit accepted the offer to compromise made by Michael and Kamel pursuant to Code of Civil Procedure section 998. The offer did not mention costs or attorney fees. Judgment was entered on May 16, 2017, in favor of Michael and Kamel. Under Civil Code section 1717, subdivision (a), Michael and Kamel were the prevailing parties and entitled to reasonable attorney fees under the fee provisions of the lease. Addendum M superseded the attorney fee cap contained in the agreement and was required by law to be applied to either party to the agreement. The court found Michael and Kamel's reasonable attorney fees totaled \$28,000. On October 12, 2017, the trial court entered an order granting the motion for attorney fees and interlineated the May 16, 2017 judgment to reflect attorney fees of \$28,000 awarded against Beloit. Beloit filed a timely notice of appeal from the order awarding attorney fees.

DISCUSSION

No Waiver of Costs

Beloit contends that Michael and Kamel's section 998 offer, coming after Beloit's own offer to resolve the litigation,

must be read to have included an agreement for both parties to waive an award of costs. This contention has no merit.

An offer to compromise under Code of Civil Procedure, section 998, subdivision (b), “shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.”

“Ascertaining the terms of an offer, including the determination whether the offer is sufficiently specific and certain for purposes of section 998, is a question involving the interpretation of a writing. We independently interpret a writing if the interpretation does not turn on the credibility of extrinsic evidence.” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 765.)

“[C]ontract principles of interpretation apply to interpreting section 998 offers.” (*Timed Out LLC v. 13359 Corp.* (2018) 21 Cal.App.5th 933, 942 (*Timed Out*).) “The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. [Citation.] In engaging in this function, the . . . court “give[s] effect to the mutual intention of the parties as it existed” at the time the contract

was executed. [Citation.] Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. . . . [Citations].’ [Citation.]” (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 68–69 (*Wind Dancer*).)

“Courts first look to the plain meaning of the agreement’s language. (Civ. Code, §§ 1638, 1644.)” (*Linton v. County of Contra Costa* (2019) 31 Cal.App.5th 628, 636 (*Linton*).) “A fundamental principle of contract interpretation is that words should be given their ‘usual and ordinary meaning.’ [Citation.]” (*Timed Out, supra*, 21 Cal.App.5th at p. 943.)

“The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. [Citations.] Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. [Citations.]’ [Citation.]” (*Wind Dancer, supra*, 10 Cal.App.5th at p. 69.)

An offer that is silent about attorney fees and costs does not preclude a later fee motion. (*Timed Out, supra*, 21 Cal.App.5th at p. 944.) “Indisputably, a section 998 offer that is silent as to attorney fees cannot reasonably be interpreted as excluding such recovery to the prevailing party, provided attorney fees are authorized by statute or contract. (*Wohlgemuth v. Caterpillar, Inc.* (2012) 207 Cal.App.4th 1252, 1259.)” (*Linton, supra*, 31 Cal.App.5th at p. 632.)

Michael and Kamel's written offer to compromise under section 998 provided for judgment to be entered in their favor on the complaint and the cross-complaint, including a payment of \$500 to Michael and Kamel. The settlement offer made by Michael and Kamel did not include a waiver of costs. The plain, unambiguous language of the offer did not preclude an award of costs, and Beloit accepted the offer. Beloit's extrinsic evidence of terms that the parties discussed prior to entering the written agreement is not admissible to vary the unambiguous terms of the agreement. (*Wind Dancer, supra*, 10 Cal.App.5th at p. 69.)

Even were we to find ambiguity on the issue of costs in the agreement reached by the parties, there is substantial evidence to support the trial court's finding that the settlement did not include a waiver of costs by Michael and Kamel. The email correspondence between the parties relied on by Beloit makes clear that Michael and Kamel were not accepting Beloit's offer for dismissal with prejudice of the litigation, but rather entry of judgment in Michael and Kamel's favor, and the draft judgment (which was not objected to by Beloit) included space for inclusion of attorney fees.

Attorney Fees

Beloit raises several contentions on appeal concerning the application of Civil Code section 1717 to the attorney fees provisions of the lease and Addendum M. Even if we

were to find the record adequate to review the contract issues on appeal, none of the issues raised have merit.

A. Civil Code section 1717

“A party may not recover attorney fees unless expressly authorized by statute or contract. (Code Civ. Proc., § 1021; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*).) In the absence of a statute authorizing the recovery of attorney fees, the parties may agree on whether and how to allocate attorney fees. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341 (*Xuereb*).) They may agree the prevailing party will be awarded all the attorney fees incurred in any litigation between them, limit the recovery of fees only to claims arising from certain transactions or events, or award them only on certain types of claims. The parties may agree to award attorney fees on claims sounding in both contract and tort. (*Id.* at pp. 1341–1342.)” (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 818 (*Brown Bark*).)

“To ensure mutuality of remedy, however, section 1717 makes an attorney fee provision reciprocal even if it would otherwise be unilateral either by its terms or in its effect. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 (*Santisas*); *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds*).) Specifically, section 1717 states, ‘In any action on a contract, where the contract specifically provides that

attorney[] fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney[] fees in addition to other costs.’ (§ 1717, subd. (a).)” (*Brown Bark, supra*, 219 Cal.App.4th at pp. 818–819.)

Civil Code section 1717 makes an attorney fee provision reciprocal that would otherwise be unilateral ““when the contract provides the right to one party but not to the other.” [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, “whether he or she is the party specified in the contract or not” [citation].’ (*Santisas, supra*, 17 Cal.4th at pp. 610–611.)” (*Brown Bark, supra*, 219 Cal.App.4th at p. 819.)

B. Voluntary Dismissal

Beloit contends that there was no prevailing party under Civil Code section 1717, because the matter was voluntarily dismissed. This is plainly incorrect. Judgment was entered in favor of Michael and Kamel on the complaint and the cross-complaint. Michael and Kamel did not voluntarily dismiss their cross-complaint. Beloit’s belated attempt to file a voluntary dismissal was made several months after judgment already had been entered against

Beloit, and would have pertained solely to the third amended complaint, not the cross-complaint.

Further, to the extent Beloit challenges the trial court's determination that Michael and Kamel were prevailing parties, the record is inadequate to review Beloit's contention. "In many cases involving the substantial evidence or abuse of discretion standard of review . . . a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable." (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.) The appellant is responsible for providing a reporter's transcript or an adequate substitute. (*Ibid.*; see also Cal. Rules of Court, rule 8.120(b) [an appellant "must include" a reporter's transcript or agreed or settled statement when "rais[ing] any issue that requires consideration of the oral proceedings"].) Without the operative pleadings and a reporter's transcript or an agreed or settled statement of the hearing on the motion for attorney fees, this court cannot review the evidence and arguments presented at the hearing on the issue of prevailing party.

C. Unilateral Provision

Addendum M states that if Beloit incurs attorney fees or other costs to enforce or defend the lease, "Lessee agrees to pay all such fees, costs, and expenses upon demand whether or not suit is filed against Lessee" and "Lessee shall be responsible for any and all charges, costs and attorney

fees by reason of Lessee's default." On appeal, Beloit contends that the trial court should have limited Michael and Kamel's recovery of attorney fees to \$500, because Addendum M provides solely for Beloit to recover additional attorney fees. Civil Code section 1717, however, makes a unilateral attorney fees provision applicable to both parties. Michael and Kamel were entitled to recover their additional attorney fees under Addendum M pursuant to Civil Code section 1717.

During oral argument on appeal, Beloit argued for the first time that both parties are limited to recovery of \$500 in attorney fees under the lease, and Addendum M merely provides additional conditions within the \$500 cap. Beloit forfeited this argument by failing to state the point in its briefs under a separate heading or subheading summarizing the point, with argument and, if possible, citation of authority, as required under California Rules of Court, rule 8.204. (See *Richard v. Richard* (1954) 123 Cal.App.2d 900, 902 (*Richard*).)¹

¹ Nor does it appear that Beloit made this argument in the trial court. In its written opposition to the request for fees in the trial court, although Beloit acknowledged the mutuality in the plain language of the \$500 cap, Beloit was careful to suggest that, in operation, the cap would only apply to the tenants' recovery of prevailing party fees. With respect to its own fees, Beloit argued that "Addendum M seeks to expand and/or modify Section 19 by creating a proverbial 'one-way' street to recovery of costs (in favor of [Beloit])." Beloit explained that Addendum M "removes any

In addition, to interpret the contract provisions, we look to the plain meaning of the language of the agreement to ascertain the parties' intent. "The mutual intention of the contracting parties at the time the contract was formed governs. [Citations.] We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. [Citations.] We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation. [Citation.] We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. [Citation.] If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. [Citation.]" (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245 (*American*).)

The common sense interpretation of the lease agreement as a whole was to limit recovery of attorney fees to \$500 initially, but through the addendum, allow the landlord to recover all of the landlord's attorney fees in specified actions. The trial court found Addendum M superseded the \$500 cap on attorney fees in the lease, and based on this interpretation, the court awarded additional

cap on attorney fees for the lessor [i.e., Beloit]" and described the addendum as a "unilateral attorney fee provision . . . which allows [Beloit] to recover *any* award of attorney fees and costs[.]"

fees to Michael and Kamel. During oral argument on appeal, Beloit's attorney characterized his client as trying to "have his cake and eat it too," which describes an agreement limiting the tenant's recovery of attorney fees, while providing for unlimited recovery of attorney fees by the landlord in specified situations. In the context of the lease as a whole, it would be absurd to conclude the parties intended to impose additional limitations on the landlord's recovery of \$500 in attorney fees through the addendum.

Even were we to find the contract language ambiguous and susceptible of more than one reasonable interpretation in the context of the lease, we would have to affirm the judgment. "The interpretation of a contract, including the resolution of any ambiguity, is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence." (*American, supra*, 135 Cal.App.4th at p. 1245.) "Error is never presumed, but must be affirmatively shown. [Citations.] It is incumbent upon an appellant to make it affirmatively appear that error was committed by the trial court." (*Richard, supra*, 123 Cal.App.2d at p. 902.) Without a reporter's transcript, we cannot review the arguments, concessions and extrinsic evidence provided to the trial court to interpret the contract language. Based on the record before us, we cannot conclude that the trial court erred in interpreting the lease.

D. Waiver

Beloit also contends that Addendum M is void, because it contains a waiver of the right to attorney fees in contravention of Civil Code section 1717. This is incorrect. The language of Addendum M does not contain any waiver of the tenants' rights under Civil Code section 1717.

DISPOSITION

The judgment is affirmed. Respondents George Michael and Brigitte Kamel are awarded their costs on appeal.

MOOR, J.

I CONCUR:

KIM, J.

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BAKER, Acting P. J., Dissenting

On the merits, this is an easy case. The residential lease in question limits attorney fee awards to \$500. The paragraph on attorney fees in Addendum M to the lease arguably uses some broader language regarding the amount of attorney fees that can be recouped by a prevailing party (e.g., “all such fees”), but the paragraph concludes with this key language: “Refer to Lease for limitations.” That reference to “limitations” is an obvious reference to the \$500 cap, and thus, the plain language of the lease documents establishes the trial court’s order awarding \$28,000 in fees should be reversed with directions to reduce the award to \$500.

Counsel for Beloit & Associates, Inc. (Beloit), however, makes the appeal more complicated than necessary. In the trial court, Beloit straightforwardly argued that “any award of attorney fees must be capped to no more than \$500.00” under the relevant provision of the lease. On appeal, however, Beloit’s counsel waits until the reply brief to clearly reprise this argument, and does so in the midst of a convoluted and unpersuasive argument concerning the

purported effect of Civil Code section 1717 on the attorney fee provisions in the lease documents.

So it is true the argument made by Beloit on appeal is not made well. But in my view it is made well enough. I cannot justify disregarding a glaring error in interpreting the lease documents, one that results in a mistaken award of tens of thousands of dollars in attorney fees, by an overly strict Marquess of Queensbury-type application of appellate brief formatting rules or abstract theorizing about possible concessions made below. I therefore respectfully dissent.

BAKER, Acting P. J.